IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DAWN M.,

Plaintiff,

v.

Civil Action No.
6:20-CV-1350 (DEP)

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OFFICE OF PETER M. HOBAICA
2045 Genesee Street
Utica, NY 13501

B. BROOKS BENSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

JESSICA RICHARDS, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on March 16, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: March 22, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DAWN M.,

Plaintiff,

-v- 6:20-CV-1350

SOCIAL SECURITY,

Defendant.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. PEEBLES
March 16, 2022
100 South Clinton Street, Syracuse, New York

For the Plaintiff:
(Appearance by telephone)

OFFICE OF PETER M. HOBAICA, LLC
2045 Genesee Street
Utica, New York 13501
BY: **B. BROOKS BENSON, ESQ.**

For the Defendant:
(Appearance by telephone)

SOCIAL SECURITY ADMINISTRATION
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15 New Sudbury Street
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BY: **JESSICA RICHARDS, ESQ.**

Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR
Official United States Court Reporter
100 South Clinton Street
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(The Court and all parties present by telephone. Time noted: 10:22 a.m.)

THE COURT: Let me begin by thanking counsel for excellent and spirited and comprehensive analyses, both written and verbal.

Plaintiff has commenced this action pursuant to 42, United States Code, Sections 405(g) and 1383(c)(3). The background is as follows: Plaintiff was born in October of 1969. She's currently 52 years of age. She was 45 years old at the alleged onset of disability on January 10, 2015. Plaintiff stands 5'3" in height and has weighed approximately 210 pounds, plus or minus, over time. Plaintiff has two adult children. She currently resides in a transitional facility known as the Hope House in Utica, New York. It is a facility intended for long-term transition from inpatient to outpatient rehabilitation over a period of six to nine months. She lives with a roommate there. Plaintiff has a high school education and two Associate's degrees, one in accounting and one in psychology. Plaintiff has no driver's license as a result of at least two, and possibly three, driving while intoxicated convictions.

Plaintiff stopped working in -- on any kind of long-term basis on February 1, 2012. She was fired from that position. She has held positions as a medical billing clerk, an office manager, a manufacturing production assistant, and a receptionist in various settings. She has what I would

characterize as failed work attempts, meaning of short-term duration, with the Salvation Army in Rochester, New York in 2015, a Wendy's in 2017, and Aspen Dental in 2018.

Physically, although that is not the focus of plaintiff's challenge in this case, she suffers from bilateral hip issues including arthritis, she had a left hip injury sustained on January 22, 2016, she was also status post carpal tunnel syndrome release. She had undergone left and right releases on separate dates in 2016. Plaintiff has been prescribed a TENS unit and also a walker.

Mentally, plaintiff has been variously diagnosed as suffering from depression or major depressive disorder, posttraumatic stress disorder or PTSD, anxiety disorder, bipolar disorder, borderline personality disorder, alcohol abuse disorder (severe), and panic disorder. She has had multiple suicide attempts, multiple hospitalizations, and rehabilitation efforts. Plaintiff began binge drinking or self-medicating in 2011. She has maintained sobriety since December 24, 2018. Plaintiff regularly sees both a psychiatrist and counselors. She has been prescribed various medications, including Gabapentin for pain, Trazodone for sleep, Wellbutrin, Effexor, Venlafaxine, Vistaril, Naltrexone, Neurontin, and Mirtazapine.

In terms of activities of daily living, plaintiff is able to dress, bathe, groom, cook, and prepare some food, clean, do laundry, shop, take public transportation, read. She enjoys

music and coloring.

Procedurally, plaintiff had a previous application -- two applications for disability benefits and SSI payments that were filed on October 23, 2013, and dismissed on January 9, 2015. Those were not reopened.

Plaintiff filed Title II and Title XVI applications again on February 16, 2016, alleging an onset date of January 10, 2015, the day after dismissal of her earlier applications. In her function report, she claims disability based on bipolar disorder, PTSD, mood disorder, anxiety, depression, arthritis, and left hip injury. A hearing was conducted on March 21, 2019, by Administrative Law Judge Jennifer Gale Smith to address plaintiff's applications for benefits. On July 5, 2019, ALJ Smith issued an unfavorable decision. That became a final determination of the agency on August 28, 2020, when the Social Security Administration Appeals Council denied plaintiff's request for a review. This action was commenced on October 30, 2020, and is timely.

In her decision, ALJ Smith applied the familiar five-step sequential test for determining disability. She noted initially that plaintiff's last date of insured status was March 31, 2017. At step one, she concluded that plaintiff had not engaged in substantial gainful activity since January 10, 2015, although she noted failed work attempts subsequent to that date.

At step two, ALJ Smith concluded that plaintiff suffers from severe impairments, physical and mental, that impose more than minimal limitations on her ability to perform basic work activities, including osteoarthritis of the hips, status post right carpal tunnel release, and obesity on the physical side. And mentally, anxiety disorder, depressive disorder, bipolar disorder, borderline personality disorder, posttraumatic stress disorder, alcohol abuse, and substance abuse disorder.

At step three, initially based on the opinion of state agency consultant Dr. Mary Eileen Buban, she concluded that in the presence of alcohol plaintiff would meet or medically equal the listed presumptively disabling impairments. She then proceeded to assess whether those listings would be met in the absence of alcohol abuse and, once again based on an opinion of Dr. Buban, concluded that plaintiff's conditions would not meet or medically equal any of the listed presumptively disabling conditions absent the presence of alcohol, specifically considering listings 1.02, 12.04, 12.06, 12.08, and 12.15.

The Administrative Law Judge next surveyed the evidence and concluded that plaintiff retains the residual functional capacity, or RFC, to perform light work with both physical and mental limitations. Pertinent to this case, the mental limitations include the following: The claimant retains

the ability to work at simple routine and repetitive tasks in a low stress job defined as occasional decisionmaking, occasional judgment required, and occasional changes in the work setting. The claimant should work at goal oriented work rather than production pace work. The claimant should have occasional contact with coworkers, supervisors, and the public.

Applying that residual functional capacity at step four, the Administrative Law Judge concluded that plaintiff is not capable of performing any of her past relevant work.

At step five, the Administrative Law Judge concluded based on the testimony of a vocational expert that not withstanding her limitations with the RFC determined by the ALJ, plaintiff could perform work available in the national economy and cited as representative occupations mail clerk, office helper, and photocopy machine operator. The Administrative Law Judge concluded that alcohol is a contributing factor material to the determination of disability based again on Dr. Buban's opinions and as I said before, concluded that with alcohol plaintiff would meet or medically equal listing 12.04.

As, you know, the Court's function in this case is limited to determining whether correct legal principles were applied and substantial evidence supports the resulting determination. Substantial evidence is defined as such relevant evidence as a reasonable mind would find satisfactory to support a conclusion. In its decision in *Brault v. Social Security*

Administration Commissioner, 683 F.3d 443 from the Second Circuit, 2012, the circuit noted that this is an extremely deferential standard. It's setting a high bar for a claimant. It is more rigorous than the clearly erroneous standard. Under the substantial evidence standard, the Court noted in *Brault* once an ALJ finds a fact, that fact can be rejected only if a reasonable factfinder would have to conclude otherwise.

In this case, plaintiff raises five basic contentions. First, she challenges the rejection of the treating source opinion from Dr. Samenfeld-Specht alleging that it was entitled to controlling weight with regard to performance at a consistent pace without an unreasonable number and length of rest and the ability to deal with work stress. The second argument again challenges the rejections of Dr. Samenfeld-Specht's opinion regarding plaintiff being off task and absent. Third, plaintiff claims error in finding that alcohol abuse was a contributing factor to the disability determination. Fourth, she claims that it was error to elevate the opinion of a state agency consultant, Dr. Buban, over the opinions of a treating source, Dr. Samenfeld-Specht. And five, she alleges error in not recontacting Dr. Samenfeld-Specht to clarify his opinions.

This case is governed by the former regulations based on the date on which plaintiff's applications were filed. Under those regulations, ordinarily the opinion of a treating

physician regarding the nature and severity of an impairment is entitled to considerable deference provided it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence, *Veino v. Barnhart*, 312 F.3d 578, Second Circuit 2002.

Such opinions are not controlling, however, if they're contrary to other substantial evidence in the record, including the opinions of other medical experts, *Halloran v. Barnhart*, 362 F.3d 28, Second Circuit, 2004. And, of course, where conflicts arise in the form of contradictory medical evidence, their resolution is properly entrusted to the Commissioner, *Veino*, 312 F.3d at 588. When an ALJ does not afford controlling weight to a treating source's opinion, as occurred in this case, she must apply several factors to determine what degree of weight, if any, should be assigned to the opinion. Those are set out at 20 C.F.R. Sections 404.1527 and 20 C.F.R. Section 416.927, and the circuit will sometimes refer to those as the so-called Burgess factors.

The focus in this case, of course, as I said, is on plaintiff's mental capabilities. Dr. Samenfeld-Specht provided a medical source statement dated May 8, 2019, it appears at pages 1996 to 2005 of the record. He is a board certified psychiatrist. His opinion states that plaintiff is seriously limited, which on the form is defined as between 11 and 15 percent of the time, in three areas. He also opines that

plaintiff would be off task 15 percent of the time and absent approximately four times per month. I note that Dr. Samenfeld-Specht opined that plaintiff did not meet the B criteria of the listing analysis. In his opinion, Dr. Samenfeld-Specht speaks to stress and indicates at 1999 that Dawn reports she is unable to cope with sustained high stress work environments and becomes overwhelmed if work pace or demands are high. On page 2001, he circles several categories of work components that the claimant would find stressful. Many, if not most, of those are accommodated in the RFC finding of the Administrative Law Judge.

The opinion of Dr. Samenfeld-Specht was discussed at pages 41 to 42 of the Administrative Transcript by the ALJ. He cited reason -- she cited, I should say, reasons why controlling weight was not afforded to that. He afforded partial weight, however -- she did. She noted that plaintiff [sic] had only been treating the claimant for a few sessions in 2019. She does -- he does not factor in issues of her alcohol abuse and his estimate of the amount of time claimant would be off task, absent from work, or need an unscheduled break once a week is speculative.

The Commissioner is not arguing, as I read it, that Dr. Samenfeld-Specht is not and does not qualify as a treating source because of the number of treatment sessions, it is based on four visits, February 27, 2019, March 12, 2019, April 2,

2019, and April 16, 2019. The number and length of the treatment, however, is a relevant factor under 20 C.F.R. Section 404.1527(c)(2)(i). The, as plaintiff argues, being off task 15 percent or absent four times a month would be work preclusive. The -- all of the serious limitations in the opinion were -- could be accommodated with the exception of off task and absenteeism.

I know that plaintiff has relied heavily on -- well, relied on, I will say, citing broadly the decision in *Lee G. v. Commissioner of Social Security*, 20 C.F.R. Section -- I'm sorry, 20 -- it is 2021 WL 22612 from the Northern District of New York, January 4, 2021, from my colleague Magistrate Judge Daniel J. Stewart. I find that that case is readily distinguishable. In that case, the ALJ failed to acknowledge the existence of the treating relationship, as well as frequency, length, nature, and extent of the treatment, and did not provide other sufficient reasons for his conclusion and therefore the treating source rule was violated. This case is, in my view, distinguishable.

I note moreover that we're discussing moderate limitations in mental functioning, which under *Raftis v. Commissioner of Social Security*, 2018 WL 1738745, Northern District of New York, April 6, 2018, is not per sé preclusive of the ability to perform basic work functions. I also note that Dr. Samenfeld-Specht's opinion is internally inconsistent regarding being off task and absent. The doctor finds that

plaintiff has a limited but satisfactory ability, meaning less than ten percent, to complete a normal workday and normal workweek without interruptions and psychologically based symptoms and limited but satisfactory to serious -- there's checkmarks in both boxes -- with maintaining attention in two-hour segments. The bottom line is, as the ALJ noted, Dr. Buban reviewed all of plaintiff's medical records, including pertinently Dr. Samenfeld-Specht's opinion, although her resulting RFC, absent alcohol at page 2051, did not specifically speak to extra breaks or time off task or absenteeism, it provides a narrative RFC which provides a basis to conclude that plaintiff is capable of performing work on a regular and -- regular basis and full-time basis.

The ALJ relied on the opinion of Dr. Buban and did not substitute her lay opinion for the opinions of Dr. Samenfeld-Specht. I conclude that the treating source rule has not been violated when the ALJ's decision is reviewed as a whole, *Estrella v. Berryhill*, 925 F.3d 90, Second Circuit, 2019.

With regard to recontacting Dr. Samenfeld-Specht concerning ambiguity, I'm not sure there is ambiguity, but in any event, the regulations that apply as to recontacting medical sources permits, but does not mandate, recontacting. Here, the ALJ afforded more weight to Dr. Buban's opinion who reviewed Dr. Samenfeld-Specht's opinion and I find no error.

The alcohol abuse protocol, as the Commissioner has

noted, SSR 13-2p provides guidance in evaluating cases involving drug and alcohol addiction. Where there is medical evidence of an applicant's drug or alcohol abuse or disability, inquiry does not end with step five analysis, instead the Contract with America Advancement Act adopted in 1996 requires that an individual must not be considered disabled if alcoholism or drug addiction would be a contributing factor material to the Commissioner's determination that the individual's disabled. The critical question then becomes whether the claimant would be disabled if he or she stopped using drugs or alcohol. In such an instance, the burden of demonstrating that substance abuse is not a contributing factor to the disability determination rests with the claimant, *Cage v. Commissioner of Social Security*, 692 F.3d 118, Second Circuit, 2012.

In this case, the Administrative Law Judge did go through the required protocol. Here, he concluded -- she concluded that in the presence of alcohol, the -- a listing presumptively disabling impairment would be met and plaintiff would be found disabled at step three with alcohol abuse and properly stopped the inquiry at that step. She then concluded that without alcohol, the B and C criteria would not be met and that plaintiff has the ability or the RFC to perform work. That was based on Dr. Buban's opinion, which was given great weight at page 42. The ALJ cited reasons and had found her opinion to be, frankly, more complete and thorough than in many I have

seen. She cited reasons and the evidence primarily from Dr. Buban, but also Dr. Samenfeld-Specht in many respects, supports the RFC when alcohol abuse is not present.

The claimant has suggested that it is improper to elevate the opinions of a state agency non-examining consultant over a treating source. Case law is to the contrary, *Anselm v. Commissioner of Social Security*, 737 F. App'x 552 from the Second Circuit, 2018, and *Camille v. Colvin*, 652 F. App'x 25, from June 15, 2016. Dr. Buban reviewed the entire record and listed in her opinions all of the records that were reviewed and provided an RFC in narrative form on 2051, the Administrative Law Judge thoroughly discussed the B and C criteria, and the absence of substance abuse based on Dr. Buban, and the review of the entire record.

I find that plaintiff has not sustained her burden of demonstrating that the alcohol abuse was not a contributing factor material to the issue of disability and that the determination as to substance abuse is a contributing factor in this case material to the determination of disability as supported by substantial evidence. I find that the residual functional capacity finding in most instances accommodates, frankly, the limitations set forth in Dr. Samenfeld-Specht's opinions, including plaintiff's ability to deal with stress and to the extent it doesn't the ALJ properly explained why the additional limitations were rejected, and Dr. Buban's opinion

provides ample substantial evidence to support that determination.

In conclusion, I find no error and that the correct legal principles were applied and the resulting determination is supported by substantial evidence. Plaintiff has failed to carry her burden of demonstrating greater limitations than were found in the RFC, as was her burden. I therefore grant judgment on the pleadings to the defendant and order dismissal of plaintiff's compliant.

Thank you, both. I hope you have a good afternoon.

MR. BENSON: You, too. Thank you, Judge.

MS. RICHARDS: Thank you, your Honor.

(Time noted: 10:47 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 21st day of March, 2022.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR

Official U.S. Court Reporter